MOTION FILED
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Nos. 80-1208,-1471,-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEW ENGLAND POWER COMPANY, *Appellant*
v.
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL., *Appellees*

COMMONWEALTH OF MASSACHUSETTS, ET AL., *Appellants*
v.
NEW HAMPSHIRE
LEGISLATIVE UTILITY CONSUMERS' COUNCIL, *Appellees*

DENNIS J. ROBERTS II, ET AL., *Appellants*
v.
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL., *Appellees*

ON APPEALS FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The New England Power Pool Executive Committee hereby respectfully moves for leave to file the accompanying brief as amicus curiae in this case. The consents of the appellants in all of the consolidated cases have been filed with the Clerk. The State of New Hampshire and the New Hampshire Public Utilities Commission, appellees, have given a limited consent to the filing of an *amicus curiae* brief by the New England Power Pool Executive Committee. A copy of that limited consent has also been filed.

The New England Power Pool ("NEPOOL") is comprised of 79 private and public electric utilities which serve customers in the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[1] Through NEPOOL, the participant utilities[2] have agreed to interconnect and coordinate the operation of their generation and transmission facilities in order to assure conformance to proper standards of electric service reliability and to attain maximum practicable economy in regional electric bulk power supply. Electric utilities participating in NEPOOL own and control substantially all of the bulk electric generation and transmission facilities in the six New England states.

All NEPOOL activities are performed without regard to the boundaries of the New England states. Pursuant to the NEPOOL arrangements, the electric generation units of the participant utilities are centrally dispatched by the pool on the basis of maximum practicable economy, without regard to ownership. Electric energy generated by those units flows freely over the interconnected network of transmission facilities which is owned and operated by the NEPOOL participants in each of the New England states. In addition to

[1] This Motion and the accompanying Brief are filed on behalf of all NEPOOL participant utilities except Public Service Company of New Hampshire ("PSNH"). PSNH has requested the NEPOOL Executive Committee to inform the Court that PSNH is not joining in the Motion or Brief.

[2] The NEPOOL participants, including the Appellant New England Power Company, are listed in Exhibit A of this Motion and Brief.

coordinated operation, the NEPOOL arrangements provide for joint reliability review and planning of the bulk electric generating and transmission facilities necessary to meet customer needs throughout the region. NEPOOL is generally considered to be the most comprehensive electric power pooling arrangement in the United States. Economic Regulatory Administration, U.S. Dept. of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

The New Hampshire statute and the order of the New Hampshire Public Utilities Commission ("PUC") at issue in this case will interfere with the operation of this interstate power pool. NEPOOL is more familiar with this aspect of the challenged order's effect on interstate commerce than are the parties. NEPOOL can therefore add to this Court's appreciation of the burden on interstate commerce created by the PUC's action.

NEPOOL is also able to contribute to the Court's consideration of the federal statutory preemption issues raised on the appeals. A part of the federal laws in question deals with regional pooling of electricity through pools operating as NEPOOL does in New England. That portion of the law is particularly well known to NEPOOL, which is also particularly sensitive to the interference with the purposes and objectives of the federal law which the New Hampshire order has created.

The NEPOOL Executive Committee therefore urges that it be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

July, 1981

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Section 374:35 of the New Hampshire Revised Statutes Annotated, As Applied, Creates an Impermissibie Burden on Interstate Commerce 2

A. Section 374:35, As Applied, Burdens Interstate Commerce 2

B. The Discriminatory Burden Imposed On Interstate Commerce By Section 374:35 Is Not Incidental to the Accomplishment of Permissible State Goals, Nor Is It Authorized By Congress 5

II. Section 374:35, As Applied By the PUC, Conflicts With Parts I and II of the Federal Power Act 8

CONCLUSION 11

EXHIBIT A 12

TABLE OF AUTHORITIES

CASES:	PAGE
Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965)	8, 9
First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152 (1946)	8, 9
Hughes v. Oklahoma, 441 U.S. 322 (1979)	5, 6
Lewis v. BT Investment Managers, 100 S. Ct. 2009 (1980)	8
Milwaukee v. Illinois, 101 S. Ct. 1784 (1981)	7, 8, 9
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	7
Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)	9
United States v. Public Utilities Commission, 345 U.S. 295 (1953)	6
STATUTES:	
Federal	
Federal Power Act	
Part I, §§ 1-29, 16 U.S.C. §§ 802-823	1, 8, 9
Section 10, 16 U.S.C. § 803(a)	9
Part II, §§ 201-212, 16 U.S.C. §§ 824-824k	*passim*
Section 201(b), 16 U.S.C. § 824(b)	*passim*
Section 202, 16 U.S.C. § 824a	9, 10, 11
Federal Water Pollution Control Act § 505(e), 33 U.S.C. § 1365	7, 8
Public Utility Regulatory Policies Act § 205, 16 U.S.C. § 824a-1	10
New Hampshire	
N. H. Rev. Stat. Ann. § 374.35	*passim*
ADMINISTRATIVE ACTIONS:	
New England Power Pool Agreement, Opinion Nos. 775, 775-A (FPC 1976), *aff'd sub nom., Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978)	10
New England Power Pool Agreement, Initial Decision, FPC Docket No. E-7690 (1975)	11

INTEREST OF THE AMICUS CURIAE

The interest of the New England Power Pool ("NEPOOL") Executive Committee in this case is set forth in the accompanying Motion by the NEPOOL Executive Committee for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The basic question in this appeal is the validity of New Hampshire's hydroelectricity export statute, N.H. R.S.A. 374:35, and of an order of the New Hampshire Public Utilities Commission ("PUC") issued pursuant to that statute. Taken together, the statute and order could substantially impede the multi-state cooperative effort of NEPOOL to assure the reliability of electric service and to minimize the cost of electricity in all of the New England states. The statute and order also undermine the federal regulatory scheme pursuant to which electric pooling operations are conducted in the six-state New England region.

The adverse impact of the New Hampshire statute and order on the interstate activities of NEPOOL, combined with the order's purpose and effect of securing the benefit of New Hampshire's water resources solely for New Hampshire residents and the order's apparent retaliatory motivation, constitute a burden and threat to the free flow of interstate commerce. Congress has not authorized New Hampshire's action and the Commerce Clause does not permit a State to act in such a manner.

The New Hampshire statute and order also interfere with the accomplishment of Congress' objectives in enacting Parts I and II of the Federal Power Act. No provision of the Federal Power Act or of any other federal statute authorizes such interference by New Hampshire. Accordingly, Section 374:35 of the New Hampshire Revised Statutes Annotated, as applied, is preempted by federal law.

ARGUMENT

I. Section 374:35 of the New Hampshire Revised Statutes Annotated, As Applied, Creates an Impermissible Burden on Interstate Commerce.

A. Section 374:35, As Applied, Burdens Interstate Commerce.

Although the New Hampshire statute appears to contemplate control over the physical movement of electric energy in order to assure its availability for use within that state, the challenged PUC order does not act to restrict the movement of electric energy produced by the Connecticut River hydroelectric plants owned by New England Power Company ("NEP"). The NEPOOL Executive Committee therefore understands that the electric energy from these hydroelectric plants will continue to be generated subject to NEPOOL dispatch and that such energy will be delivered into the regional transmission network controlled by NEPOOL. Based upon this understanding, the NEPOOL Executive Committee at this time has no reason to believe that the central dispatch of generating and transmission facilities by NEPOOL will be affected by the PUC order. Nevertheless, the PUC order does threaten achievement of the pool's goals of assuring a reliable bulk power supply for the New England region while attaining maximum practicable economy.

The NEPOOL arrangements are structured to achieve the pool's objectives through a number of activities in addition to the central dispatch of the region's bulk electric power facilities. Thus, the NEPOOL arrangements provide for sharing of the saving achieved by pool energy interchange transactions, joint participant facility planning, maintenance of minimum generating reserves, joint cooperation in environmental matters, and coordinated construction, operation and maintenance of the electric generation and transmission facilities owned or controlled by the pool participant electric utilities.

The PUC order will discourage coordinated planning and construction of electric generation and transmission facilities on a regional basis. The New England region, although relatively small, is divided into six states, which are served by a large number of relatively small electric utilities. In order to conserve resources and to secure for their customers the economies of large-scale facilities, New England electric utilities have for many years worked together in the joint planning and joint ownership of generating units. For example, electric utilities from each of the six New England states are owners of interests in regionally-sized nuclear generating plants constructed, or under construction, in Maine, Vermont, Connecticut, Massachusetts and New Hampshire.

While the jointly planned and owned facilities in New England to date have typically not included hydroelectric facilities, future large-scale conventional or pumped storage hydroelectric plants are very likely to be approached on a regional basis. Pumped storage generating plants are large hydroelectric projects which are frequently constructed and operated to complement nuclear generating plants. Two of these large-scale hydroelectric facilities already serve the New England region, having been constructed in Massachusetts by NEPOOL participants. If the challenged PUC order is allowed to stand, electric ratepayers in Massachusetts and Rhode Island, who have for many years supported the costs of NEP's hydroelectric plants in New Hampshire through their rate payments, will no longer continue to receive the economic benefits of lower cost electric energy produced by these plants. It is obvious that New Hampshire's action, if it is permitted to stand, will effectively inhibit NEPOOL participant electric utilities in any other state from participating in future conventional hydroelectric or pumped storage facilities located in New Hampshire.

The New Hampshire order is also likely to affect adversely the joint planning and construction of major facilities other than hydroelectric plants. If allowed to stand, New Hampshire's action will act as an incentive to the

other New England states to secure exclusive benefits for their citizens from the location of generation and transmission facilities in those states. State utility regulatory bodies will be unwilling to permit electric utilities subject to their jurisdiction to invest in the ownership of generating plants in another state when there is any risk that the output of such plants may be required to be sold to customers in the other state and therefore be of no benefit to the retail ratepayers of the owner utility.

The challenged PUC order will also interfere with the NEPOOL arrangements in areas other than regional planning. The pool arrangements assume that the generating facilities of each participant will be first utilized to serve the electric needs of that utility's customers. Any surplus capacity is then available to be shared by the other pool participants. For example, the electric energy produced by NEP's Connecticut River hydroelectric plants is presently considered to be first used to meet the electric service requirements of NEP's customers. Thus, the PUC order effectively destroys a basic premise of pool economics.

The adverse effect of the order on NEPOOL economic arrangements encompasses reserve obligations as well as energy transactions. If NEP is required to sell the electric output of its Connecticut River hydroelectric plants within New Hampshire, the capacity of those generating plants will no longer be considered to be available to meet the capacity requirements of customers which NEP is obligated to serve in Massachusetts and Rhode Island. NEP's responsibility to have specific amounts of electric generating capacity will not be changed, but the capacity available to meet its NEPOOL obligations will be reduced by approximately 420 megawatts. Therefore, NEP's capacity planning within the NEPOOL framework will be jeopardized.

In addition to interfering with the operation of specific pool arrangements, New Hampshire's challenged action imperils NEPOOL by threatening the cooperative spirit which has been essential to the formulation and operation of a comprehensive regional pool. The NEPOOL arrangements

are the result of an extraordinary consensus among the electric systems throughout the six New England states (large and small, rural and urban, publicly-owned and privately-owned). These utilities recognized that through cooperative efforts they could secure their common primary goals of more reliable and less expensive electric service for their customers throughout the six-state region. NEPOOL also owes its existence and successful operation to the cooperative efforts of the governmental authorities of each of the six New England states.

The challenged PUC order imperils the environment of state cooperation which is needed to support NEPOOL. The utilities participating in NEPOOL are each owned by subdivisions of the states or have the conduct of their electric businesses dependent upon state grants of authority and favorable state regulation. If the PUC order is allowed to stand, other states will almost certainly consider efforts to secure comparable short-term economic benefits for their citizens. As each of the New England states seeks to engage in a competitive effort to secure economic advantage or redress, the cooperative foundation of NEPOOL's delicately balanced structure of interconnection and coordination arrangements may well be destroyed.

B. The Discriminatory Burden Imposed on Interstate Commerce By Section 374:35 Is Not Incidental to the Accomplishment Of Permissible State Goals, Nor Is It Authorized By Congress.

The deleterious impact of the New Hampshire order on the interstate activities of NEPOOL would be permissible only if that impact were incidental to a nondiscriminatory effort to achieve a permissible state goal. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Section 374:35, as applied by the PUC, does not satisfy that test.

The PUC's order is discriminatory on its face because it is directed solely against interstate commerce. Although it is conceivable that a prohibition on the interstate sale of

electricity generated by water power might be justified in certain narrowly defined circumstances,[1] New Hampshire has not relied on such circumstances to justify its action. New Hampshire has acted, in the words of the New Hampshire Supreme Court, "to regain the [economic] benefit of its hydroelectric power." J.S. App. 14; see *id.* at 11a.[2] The intent to retain for New Hampshire's citizens the economic benefits of natural resources that happen to be located in New Hampshire cannot justify the state's action; rather, this purpose requires that New Hampshire's action be held invalid in order to avoid the "economic balkanization" that the Commerce Clause was intended to prevent.[3] *E.g., Hughes v. Oklahoma, supra,* 441 U.S. at 325-26. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located with-

[1] Such circumstances might arise, for example, if a prolonged drought reduced the availability of water to generate power and threatened the public health and safety of the citizens of New Hampshire. The use of an export limitation in an emergency of that sort may have been what Congress was contemplating when it preserved state laws regulating the exportation of hydroelectric energy in §201(b) of the Federal Power Act, 16 U.S.C. §824(b). As this Court has noted, §201(b) "was intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported." *United States v. Public Utilities Commission,* 345 U.S. 295, 301 n.4 (1953). Of course, since §201(b) was enacted, interstate networks such as NEPOOL have been developed to provide backup capacity in case of a shortfall created by an emergency situation. Since the NEPOOL network would be available to assist in the circumstances posited above, there would be no need for New Hampshire to discriminate against interstate commerce in order to achieve its legitimate public health and conservation purposes. *See Hughes v. Oklahoma, supra,* 441 U.S. at 337-38.

[2] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1208.

[3] The PUC's opinion indicates that another reason for the PUC's order was to retaliate for actions taken by Massachusetts officials in proceedings in Massachusetts. J.S. App. 37a-38a. A State's use of interstate commerce as a hostage in an effort to control the actions of officials of a sister State challenges the fundamental structure of the Federal system.

in its borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

New Hampshire has not attempted to justify its actions under the principles established by this Court's applications of the Commerce Clause. Instead, it has contended that those principles do not apply because Congress has given it free reign. This contention is based on Section 201(b) of the Federal Power Act, 16 U.S.C. §824(b), which provides that Part II of the Act "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a State line." New Hampshire argues that since this provision was inserted in the Federal Power Act at the behest of New Hampshire representatives who were mindful of the existence of Section 374:35, it must be read as a congressional authorization for regulation under Section 374:35.[4] According to New Hampshire, any other reading of Section 201(b) renders that provision meaningless because the conflict between Section 374:35 and the Commerce Clause was apparent when Section 201(b) was passed. Motion to Dismiss or Affirm in No. 80-1208 ("Motion to Dismiss") at 10-18.

This Court has recently rejected a similar effort to read a statutory savings clause as a congressional affirmation of the existence of the remedy being saved. In *Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981), the Court considered whether Subsection 505(e) of the Federal Water Pollution Control Act ("FWPCA"), which preserves statutory or common law remedies from preemption by the FWPCA,[5] indicated that Illinois' remedies under the federal common law of nuisance survived the passage of the

[4] Even if New Hampshire were correct that Section 201(b) intended to confer on that State regulatory authority that it would otherwise not have under the Commerce Clause, that conclusion would not justify the application of Section 374:35 at issue in this case. See note 1 *supra*.

[5] Subsection 505(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law

FWPCA Amendments of 1972. This Court held that Subsection 505(e) did not signify a congressional determination that such common law remedies existed. As the Court stated, "There is nothing unusual about Congress enacting a particular provision and taking care that this enactment by itself not disturb other remedies, *without considering whether the rest of the Act does so or what other remedies may be available.*" 101 S. Ct. at 1798 n.22 (emphasis added).

The legislative history of Section 201(b) shows that it was enacted "without considering" whether New Hampshire then had any "lawful authority over the exportation of hydroelectric energy." Like Subsection 505(e), Section 201(b) merely reflects Congress' concern that the statutory provisions to which the savings clause was added not have a broader impact than Congress intended. *Cf. Lewis v. BT Investment Managers*, 100 S. Ct. 2009, 2022 (1980) (savings clause in Bank Holding Company Act intended "to define the extent of the federal legislation's preemptive effect on State law.") The legislative history contains no hint that Congress intended to confer on New Hampshire the power to act, as it has, in a manner that threatens the fundamental structural principles on which the Federal Union is based.

II. Section 374:35, As Applied by the PUC, Conflicts With Parts I and II of the Federal Power Act.

The two Parts of the Federal Power Act, 16 U.S.C. §§802-824k, are concerned with two different aspects of the generation and sale of electric energy. Part I authorizes the Federal Energy Regulatory Commission ("FERC") to license hydroelectric plants. It was enacted to "promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the Federal power to do so . . . ." *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180 (1946). "The principal use to be developed and regulated in the Act . . . was that of hydroelectric power to meet the needs of an ex-

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to seek enforcement of any effluent standard or limitations or to seek any other relief (including relief against the Administrator or a State agency).

panding economy." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 99 (1965). The federal licensing authority under Part I is exclusive. *First Iowa Hydro-Electric Coop. v. Federal Power Commission, supra*, 328 U.S. at 181.

Part II of the Act was passed to fill the regulatory gap created by this Court's holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that the Commerce Clause precluded state regulation of wholesale interstate sales of electricity. Under Part II, FERC exclusively regulates such sales. FERC is also charged by Part II with encouraging and promoting the development of regional power pools such as NEPOOL. 16 U.S.C § 824a.

Section 374:35, as applied by the PUC, is preempted by both Parts I and II because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The licensing power conferred by Part I is to be exercised only when FERC finds that a project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. §803(a). By reserving the economic benefit of power generated by New England Power Company's licensed hydroelectric plants for residents of New Hampshire, New Hampshire has prevented those plants from benefiting interstate commerce, the purpose for which they were federally licensed.[6]

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[6] New Hampshire has argued that there is no conflict between its action and Part I because "the reference to interstate and foreign commerce [in §803(a)] is to the use of the waterway as a highway . . ." Motion to Affirm at 8. Curiously, New Hampshire has cited *Federal Power Commission v. Union Electric Co., supra*, in support of its position. The holding of that case was that "the comprehensive development of water power . . . was the central thrust of the Act . . . ." *Id.*, 381 U.S. at 101.

The New Hampshire action creates an equally direct barrier to the accomplishment of the purposes of Part II. Although the New Hampshire Supreme Court stated that the PUC order "is not a control of rates but rather a control of the assignment of the power," J.S. App. 12a, it is obvious that the power generated by the hydroelectric plants cannot be "assigned" other than through the rate structure for wholesale sales. New Hampshire's order directly infringes on the exclusive rate-setting authority of FERC.[7]

Section 374:35, as applied by the PUC, also thwarts Congress' efforts to encourage regional power pooling. As NEPOOL has explained above, the New Hampshire action will have a serious impact on NEPOOL's ability to provide an efficient, coordinated regional electric network. Congress has repeatedly recognized a special national interest in voluntary regional electric pools, such as NEPOOL. These pools are considered by Congress to be the appropriate organizational arrangement for securing the objective of assuring an abundant national supply of electric energy with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. Federal Power Act, Section 202(a), 16 U.S.C. § 824(a); Public Utility Regulatory Policies Act, § 205, 16 U.S.C. § 824a-1.

The NEPOOL arrangements were filed with the Federal Power Commission ("FPC"), predecessor to the Federal Energy Regulatory Commission. NEPOOL was thereafter the subject of an extensive investigation under Part II of the Federal Power Act. *New England Power Pool Agreement*, Opinion Nos. ,775, 775-A (FPC 1976), *aff'd sub nom. Municipalities of Groton v. Federal Energy Regulatory*

The savings clause contained in Section 201(b) is explicitly directed to Part II of the Federal Power Act and can have no bearing on the question of preemption by Part I. See *Milwaukee v. Illinois, supra*, 101 S. Ct. at 1798 n.22.

[7] The savings clause in Section 201(b) of the Federal Power Act does not authorize this interference with FERC's rate-setting power because that clause allows, at most, state control over the volume of power exported. See note 1 *supra*.

Commission, 587 F.2d. 1296 (D.C. Cir. 1978). The FPC expressly determined that the NEPOOL arrangements conform to the mandates of the Federal Power Act and other applicable federal statutes. In particular, the FPC found that the NEPOOL arrangements advance the national policy of promoting and encouraging regional interconnection and coordination of electric facilities for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. *New England Power Pool Agreement*, Initial Decision, FPC Docket No. E-7690 at 9-11 (1975), *modified on other grounds*, Opinion No. 775 (1976); Federal Power Act, Section 202(a), 16 U.S.C. §824a(a).

New Hampshire's challenged effort to secure for its citizens the exclusive economic benefit of hydro-electric energy generated within that state jeopardizes attainment of those national policies through NEPOOL. The Constitution mandates that attainment of national policies take precedence over a state's effort to hoard for its citizens the exclusive economic benefit of its natural resources.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

July, 1981

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EXHIBIT A

LIST OF NEPOOL PARTICIPANTS

Allied Power and Light Company
Town of Ashburnham Municipal Light Plant
Bangor Hydro-Electric Company
Blackstone Valley Electric Company
Boston Edison Company
Town of Boylston Municipal Light Department
Town of Braintree Electric Light Department
Burlington Electric Light Department
Cambridge Electric Light Company
Canal Electric Company
Central Maine Power Company
Central Vermont Public Service Corporation
City of Chicopee Municipal Lighting Plant
Citizens Utilities Company
Commonwealth Electric Company
The Connecticut Light and Power Company
Connecticut Municipal Electric Energy Cooperative
Town of Danvers Electric Department
Eastern Edison Company
Village of Enosburg Falls
Fitchburg Gas and Electric Light Company
Town of Georgetown Municipal Light Department
Granite State Electric Company
Green Mountain Power Corporation
Town of Groton Electric Light Department
Village of Harwick Electric Department
The Hartford Electric Light Company
Town of Hingham Municipal Lighting Plant
Town of Holden Municipal Lighting Plant
City of Holyoke Gas & Electric Department
Holyoke Power and Electric Company
Holyoke Water Power Company
Hudson Light and Power Department
Town of Hull Municipal Light Department
Village of Hyde Park

Town of Ipswich Municipal Electric Department
Village of Johnson
Town of Littleton Electric Light & Water Department
Village of Ludlow Electric Light Department
Village of Lyndonville
Town of Mansfield Municipal Electric Department
Town of Marblehead Municipal Light Department
Massachusetts Electric Company
Massachusetts Wholesale Electric Company
Town of Middleborough Gas & Light Department
Town of Middleton Municipal Electric Department
Montaup Electric Company
Village of Morrisville Water & Light Department
The Narragansett Electric Company
New England Power Company
Newport Electric Corporation
Town of North Attleborough Electric Department
Village of Northfield
Village of Orleans
Pascoag Fire District
Town of Paxton Municipal Light Department
City of Peabody Municipal Light Plant
Princeton Municipal Light Department
Public Service Company of New Hampshire
Town of Reading Municipal Light Department
Village of Readsboro
Rochester Electric Light & Power Company
Town of Shrewsbury Electric Light Plant
Town of South Hadley Electric Light Department
Town of Sterling Municipal Electric Light Department
Village of Stowe
Village of Swanton
Taunton Municipal Lighting Plant
Town of Templeton Municipal Lighting Plant
The United Illuminating Company
Vermont Electric Co-op, Inc.
Vermont Electric Generation and Transmission Cooperative, Inc.
Vermont Electric Power Company, Inc.

Vermont Marble Company
Town of Wakefield Municipal Light Department
Washington Electric Cooperative, Inc.
Western Massachusetts Electric Company
Town of West Boylston Municipal Lighting Plant
City of Westfield Gas and Electric Light Department